82-1004



No. -

# In the Supreme Court of the United States.

OCTOBER TERM, 1982.

DANIEL SULLIVAN,
PETITIONER,

*v.*

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY OF
D.C. SULLIVAN & CO., INC.,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Questions Presented for Review.

1. Does Article III of the United States Constitution permit the pending of parties over whom there exists no independent basis for exercising jurisdiction?

2. Did Congress in enacting the Bankruptcy Act and the Bankruptcy Code intend to preclude federal courts from exercising jurisdiction over state created breach of fiduciary duty claims?

3. Whether district courts are precluded from assuming jurisdiction over parties pended to federal question claims absent interpretation of Article III and statute under which federal question jurisdiction arises.

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No. - .

# In the Supreme Court of the United States.

OCTOBER TERM, 1982.

DANIEL SULLIVAN,
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ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY OF
D.C. SULLIVAN & CO., INC.,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

The petitioner, Daniel Sullivan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 19, 1982.

## Opinions Below.

The opinion of the Court of Appeals is reported at 685 F.2d 729 (1st Cir. 1982). Relevant excerpts are appended. The full opinion is reproduced in the petition for certiorari filed by co-defendants.

## Jurisdiction.

Denial of petition for rehearing by the Court of Appeals for the First Circuit was entered on September 14, 1982. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Statutory Provisions Involved.

The Bankruptcy Act, 11 U.S.C. § 107d(2)(a) (repealed 1978); 11 U.S.C. § 107d(2)(d); and 28 U.S.C. § 1331.

## Statement of the Case.

This was an action by the trustee in bankruptcy of D.C. Sullivan & Co., Inc. against the defendants, Christopher Recklitis, Watts Detective Agency, Consolidated Service Corporation, Billy R. Otte, and Daniel Sullivan to avoid and recover an alleged fraudulent transfer of assets and for damages for unlawful diversion of corporate assets in breach of the defendants' fiduciary duty towards the company. Count One of the plaintiff's complaint was brought pursuant to the Bankruptcy

Act, § 67d(2)(a) (formerly 11 U.S.C. § 107d(2)(a)) (the Bankruptcy Code contains a similar provision 11 U.S.C. § 548 (1979)) and alleges that within the year, prior to the filing of the bankruptcy petition and while the Sullivan Company was insolvent, the defendants transferred assets of the debtor to Watts for less than fair consideration. Count Two, brought under § 67d(2)(d), also alleged fraudulent transfer, but added the element that the defendants actually intended to hinder, delay or defraud either existing or future creditors. Count Three, a pendent state claim, alleged that the defendants transferred assets of the Sullivan Company in violation of their fiduciary duty to the corporation. The defendants never alleged that defendant Sullivan received any transferred assets.

The defendants each duly filed answers. After several years in which extensive discovery was obtained, the court issued a pre-trial order, setting forth the admitted facts, disputed facts, issues of fact and issues of law. Review of the pre-trial order demonstrates conclusively that there was no allegation that Sullivan received transferred assets (pp. 12a-13a, *infra*).[1] The defendants' motions for summary judgment were denied. The trial was held from March 11, 1980 until March 17, 1980. Prior to the jury's verdict, the defendant, Daniel Sullivan, moved for a directed verdict, which motion the court denied. The jury entered judgment in favor of the plaintiff against all defendants on Count One, in favor of the defendants on Count Two and on Count Three in favor of the plaintiff as against Daniel Sullivan and Billy R. Otte. On March 20, 1980, the court entered judgment.

Each defendant filed various post-trial motions. The defendant, Daniel Sullivan, filed a motion for judgment notwithstanding the verdict and a motion for a new trial, which were denied by the court on August 28, 1981.

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[1] References to the appendix are to the selected portions reproduced at the end of this brief.

The defendant Sullivan appealed from the denial of his motion for a directed verdict, from the judgment entered in the jury verdict and from the denial of his motion for a new trial and from judgment notwithstanding the verdict.

The United States Court of Appeals reversed the decision of the United States District Court of Massachusetts in so far as the district court decision imposed liability under Count One of the plaintiff's complaint, which count had been predicated upon an alleged violation of the Federal Bankruptcy Act by defendant Sullivan. In addition, the United States Court of Appeals affirmed the decision of the United States District Court imposing liability on D.C. Sullivan for breaching a Massachusetts created fiduciary duty to D.C. Sullivan & Co., Inc.

Daniel Sullivan petitioned the United States Court of Appeals for rehearing, setting forth as grounds (1) that the district court lacked jurisdiction to entertain state law claims against the appellant, and (2) that reconsideration and reversal were warranted as the jury determination had been based on irrelevant "director mistakes," tenuous "abandonment" offerings, confusing jury instructions and an absence of damages evidence.

On September 14, 1982, the United States Court of Appeals denied the plaintiff's petition for rehearing. The Appeals Court stated: "The facts as to whether Sullivan or Otte received any of the transferred property could not be determined until after trial." (See order denying rehearing (pp. 10a-11a, *infra*).) In fact, however, as the record makes indisputably clear (see pre-trial order (pp. 12a-13a, *infra*)) it was known and understood by all parties at all times that defendant Sullivan never received any transferred assets. Moreover, it was known and understood that receipt of property by Sullivan would not be an issue at trial.

## Reasons for the Writ.

### I. The Court Below Erred Fundamentally by Failing to Undertake Required Analysis Involving Congressional Intention in Bankruptcy Statutes and the Limits of Article III Jurisdiction.

The issue presented for the Court is whether, *absent analysis and opinion*, a federal court can expand the concept of pendent jurisdiction by enabling a plaintiff to *pend both* parties and state law claims to Bankruptcy Act claims brought against a co-defendant. In this case, the plaintiff alleged that defendants Sullivan, Otte and Recklitis violated §§ 67d and 67e of the Bankruptcy Act and that they breached their state law duties to D.C. Sullivan & Co., Inc. The United States Court of Appeals reversed the finding of the jury that Sullivan and Otte had violated 67d and 67e. In reversing, the court indicated that since 1967 it has been an "open and shut question of law" that actions under 67d and 67e cannot be sustained against a defendant unless that person has been the recipient of fraudulently transferred property (pp. 2a-4a, *infra*).

Notwithstanding its conclusion that plaintiff's 67d and 67e contentions were facially defective, the court, in denying plaintiff's petition for rehearing, held that jurisdiction existed to hear the state law breach of fiduciary duty claims. In so holding, the court, without the benefit of analysis or argument by either the district court or the Court of Appeals endorsed an expansion of pendent jurisdiction that enabled the plaintiff to pend defendant Sullivan and the state law breach of fiduciary duty claims to the 67d and 67e claims brought against the co-defendants Watts Detective Agency and James Recklitis. In its denial of petition for rehearing, the Court of Appeals stated that trial was necessary to determine whether facts existed supporting a receipt of fraudulent property by Sullivan (pp.

10a-11a, *infra*). In truth, however, as the record makes indisputably clear (see pre-trial order at (pp. 12a-13a, *infra*)), all parties recognized from the outset of litigation that there would not even be an allegation that Sullivan received fraudulently transferred property.

The United States Court of Appeals' treatment of the jurisdictional question represents either a flouting of established principles governing pendent jurisdiction or an extension of the concept of pendent jurisdiction as most recently defined in *Aldinger* v. *Howard*, 427 U.S. 1, 18 (1976). In a proceeding such as the one at hand, before a court can permit a plaintiff to pend a state law claim against a defendant to a bankruptcy claim against defendant (over whom there exists no independent basis for jurisdiction), the court must examine whether the Bankruptcy Act by negative implication precludes such claims. Second, if a court can satisfy itself that the Bankruptcy Act permits such claims, the court must then satisfy itself that Article III permits the exercise of jurisdiction. *Id.*

Given that the two analyses required by *Aldinger* were not undertaken, and given that recurring, far reaching and complex questions of law inhere in this appeal, justification exists for granting a writ of certiorari.

## II. The First Circuit Decision Violates the Requirements of the Bankruptcy Act and Code.

The issue presented for the Court is whether in passing the Bankruptcy Act, Congress intended to preclude the pending of state law claims against non-recipients of fraudulently transferred property to Bankruptcy Act claims against recipients of fraudulently transferred property.

In passing the Bankruptcy Act, Congress specifically and by negative implication indicated that it did not want Bankruptcy

Act plaintiffs pending state law breach of fiduciary obligation claims against corporate directors to Bankruptcy Act claims against non-director recipients of transferred property.

The Bankruptcy Act "suggest[s] with some certainty that recovery may be had only against persons who have received the property in question." *Elliott* v. *Glushon*, 390 F.2d 514, 515 (9th Cir. 1967).

Title 11 of the United States Code, § 110(a)(4) gave the trustee his procedural rights to enforce section 67d and provided that if a transfer is made which is fraudulent under any applicable federal or state law, "the trustee shall reclaim and recover such property or collect its value from and avoid such transfer . . . against *whoever may hold or have received it* . . . . (Emphasis added.)" *Elliott* v. *Glushon*, *supra*, at 515.

The court in *Elliott* v. *Glushon*, *supra*, noted that the purpose of §§ 67d and 70 of the Act

> is clearly to preserve the assets of the bankrupt; they are not intended to render civilly liable all persons who may have contributed in some way to the dissipation of those assets. The Act carefully speaks of conveyances of property as being "null and void," and authorizes suit by the trustee to "reclaim and recover such property or collect its value". The actions legislated against are not "prohibited"; those persons whose actions are rendered "null and void" are not made "liable"; and terms such as "damages" are not used. The legislative theory is cancellation, not the creation of liability for the consequences of a wrongful act. (Footnote omitted.)

*Id.* at 516.

In view of the limited remedy created by Congress in the Bankruptcy Act, it seems beyond dispute that Congress did not

wish to have the federal courts being used to entertain state law claims against co-defendants of defendants in Bankruptcy Act proceedings.

In view of the failure to comply with *Aldinger*, and in view of the significance of the questions involving Congressional intentions in the Bankruptcy Act, justifications exist to issue a writ of certiorari.

## III. The First Circuit Decision Creates Conflict in the Circuits.

In the action at hand, the United States Court of Appeals for the First Circuit has effectively assumed that Article III of the United States Constitution permits the pending of defendant parties (over whom no independent jurisdictional basis exists) to federal question claims brought against co-defendants. The First Circuit result in this action accords with the approach adopted by the Tenth Circuit Court of Appeals in *Transok Pipeline Co.* v. *Darks*, 565 F.2d 1150 (10th Cir. 1977). In *Transok*, the Tenth Circuit concluded that *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), *Aldinger* v. *Howard*, *supra*, and several pre-*Aldinger* cases supported its holding that power exists to exercise pendent party jurisdiction. *Id.*

The approach to pendent party jurisdiction apparently endorsed by the First and Tenth Circuits stands diametrically opposed to the holding of the Ninth Circuit Court of Appeals. In *Ayala* v. *United States*, 550 F.2d 1196 (9th Cir. 1977), the Ninth Circuit Court expressly reaffirmed its earlier rejection of the doctrine of pendent party jurisdiction. *Id.* at 1198, 1200. In that case, the court held that the doctrine of pendent party jurisdiction stands beyond the constitutional parameters of Article III and cannot be used to add a defendant to a claim brought against the United States under the Federal Tort Claims Act. *Id.* at 1197-1200.

The conflict between the First Circuit and the Ninth Circuit justifies the issuance of a writ of certiorari.

## IV. The Decision Below Will Upset the Distribution of Powers Between the Federal Government and the States.

Article III of the United States Constitution sets forth the parameters of the jurisdictional latitude allowed federal courts. Any extra-Article III exercise of jurisdiction by federal courts constitutes an invasion of the powers reserved to the states.

In the action at hand, by permitting the pending of defendant Sullivan to plaintiff's claims against defendants Consolidated Service Corporation, Recklitis and Otte, the Court of Appeals has effectively assumed answers to recurring, complex questions with far reaching constitutional implications. In numerous cases, the United States Supreme Court and courts below have avoided answering the questions whether Article III permits the pending of parties and claims in the circumstances here present. See *Aldinger* v. *Howard*, 427 U.S. 1, 14, 15 (1976); *Moor* v. *County of Alameda*, 411 U.S. 693, 712-715 (1973). In so doing, the Court has noted the tremendous significance of the questions involved. The action at hand presents an ideal opportunity for the Court to set forth answers to threshold questions present in the issue of whether Article III permits the pending of parties over whom there exists no independent jurisdictional basis. Guidance at this point from the Court would be especially appropriate in that federal courts appear to be involving themselves without authority in state law decisions. Avoiding the issue of whether parties can be pended, in itself, may be viewed as a derogation of the status afforded the fifty states in our constitutional scheme.

The action at hand also presents numerous examples of the necessity for being parsimonious in defining the outlines of

Article III. Relying on generalized fiduciary concepts established by the Massachusetts Supreme Judicial Court in 1933 and 1941, the district court below, upon cursory examination, concluded that the jury could properly find a breach of fiduciary duty by corporate director Sullivan. In so doing, the district court established a standard for Massachusetts corporate directors in an area beset with complex considerations about (a) the extent to which, if any, a corporate director must possess expertise in bankruptcy, and (b) the extent to which, if any, a corporate director must attempt to prevent key employees from joining competitor corporations.

In sum, in order to protect the delicate relationship between the United States and the fifty states, a writ of certiorari should issue.

## Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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SUPPLEMENTARY APPENDIX

# United States Court of Appeals

## For the First Circuit

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Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

*v.*

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

---

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

---

BILLY R. OTTE,
DEFENDANT-APPELLANT.

---

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]

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Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges.*

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*Timothy H. Gailey*, with whom *Mark N. Polebaum*, and *Hale and Dorr* were on brief, for Watts Detective Agency, Inc., et al.

*James F. Freeley*, with whom *Feeney & Freeley* was on brief, for Daniel Sullivan.

. . . . . .

We now turn to the issue of Sullivan and Otte's liability under Count I. Although not raised by either of them below or before us, we think that under these facts there can be no liability as a matter of law because neither Sullivan nor Otte received any of the fraudulently transferred property.[10] The Act contemplates recovery by the trustee only from recipients of fraudulently transferred property.

Our ruling is informed by the reasoning of the Ninth Circuit in *Elliott* v. *Glushon*, 390 F.2d 514 (9th Cir. 1967), which held that the trustee in bankruptcy could not recover the value of fraudulently transferred property from an attorney who had acted only as an escrow holder and attorney for certain participants in the admitted transactions but had never received any of the property involved. In reaching its conclusion, the court first examined the pertinent sections of the Bankruptcy Act and noted that they "suggest with some certainty that recovery may be had only against persons who have received the property in question." *Id.* at 515. Section 67(d) provides that a transaction found to be fradulent shall be "null and void against the trustee. . . ." 11 U.S.C. § 107(d)(6). Section 70, which vests title in the trustee to, *inter alia*, property fraudulently transferred by the bankrupt, 11 U.S.C. § 110(a)(4), gives the trustee his procedural rights to enforce section 67(d) and provides that if a transfer is made which is fraudulent under any applicable federal or state law, "[t]he trustee shall

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[10] Because this issue was not raised below, we would ordinarily not consider it for the first time on appeal. *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). We recognized, however, in *Dobb* v. *Baker*, 505 F.2d 1041 (1st Cir. 1974), that we might deviate from this rule where the new ground for reversal is "so compelling as virtually to insure appellant's success." *Id.* at 1044. Here, the issue turns on an open and shut question of law.

reclaim and recover such property or *collect its value from* and avoid such transfer . . . against *whoever may hold or have received it*. . . ." 11 U.S.C. § 110(e)(2) (emphasis added).

Noting a conflict among a few earlier cases and distinguishing the leading one,[11] the *Elliott* court acknowledged the temptation to borrow from the principle of joint liability among tortfeasors in order to permit recovery against a nonrecipient. It nonetheless held that the purpose of sections 67(d) and 70 of the Act

> is clearly to preserve the assets of the bankrupt; they are not intended to render civilly liable all persons who may have contributed in some way to the dissipation of those assets. The Act carefully speaks of conveyances of property as being "null and void," and authorizes suit by the trustee to "reclaim and recover such property or collect its value." The actions legislated against are not "prohibited"; those persons whose actions are rendered "null and void" are not made "liable"; and terms such as "damages" are not used. The legislative theory is cancellation, not the creation of liability for the consequences of a wrongful act.

*Id.* at 516 (footnote omitted).

Moreover, the court reasoned, the trustee may still have a right of action for fraud or deceit under state law against those who participated in the transaction. Recovery under the Bankruptcy Act, however, embraces only the recipients of the

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[11] *Brainard* v. *Cohn*, 8 F.2d 13 (9th Cir. 1925), a case decided over four decades before the same circuit, permitted recovery against a nonrecipient of fraudulently transferred property. In that case, however, a conspiracy had been alleged, and the court held full recovery to be proper against a conspirator who received some but not all of the transferred merchandise. Central to that decision was the fact that the conspirators had intermixed the bankrupt's property with their own. *Id.* at 15.

transferred property. We believe this analysis is correct and adopt it, as other courts have done. *See, e.g., Klein* v. *Tabatchnick*, 610 F.2d 1043, 1048 n.4 (2d Cir. 1979); *Jackson* v. *Star Sprinkler Corp.*, 575 F.2d 1223, 1234 (8th Cir. 1978). *See also In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 339 (9th Cir. 1978).

The judgments against Sullivan and Otte on Count I must be reversed. This makes it unnecessary to discuss their claim that there was no evidence that they actively participated in any transfer of the assets of Sullivan Company, which, we note, is untenable as to Otte.

*Claimed Trial Errors*

The Watts appellants claim first and foremost that Sullivan's opinion as to the value of Sullivan Company was erroneously admitted into evidence. Sullivan was permitted to testify that, in his opinion, the business was worth approximately one million dollars at the time of the transfer to Watts. He relied in part for this opinion on his understanding that service businesses such as his are valued at one dollar for each dollar of annual gross sales. Because Sullivan Company had accounts worth one million dollars as of April 1970, this was the figure he used.

The district court permitted Sullivan to testify to his opinion on the value of the business because, as president and majority stockholder, he was the owner of the property. The court noted that this opinion testimony of an owner is admissible

> either as an opinion by a lay witness "based on . . . personal perception" and "helpful to a clear understanding of his testimony of the determination of a fact in issue" under [Federal] Rule [of Evidence] 701, or as an expert opinion by one who is "qualified as an expert by knowledge . . . [or] experience" under Rule 702.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 70-1336-N

DANIEL GLOSBAND, TRUSTEE IN BANKRUPTCY OF
D. C. SULLIVAN & CO., INC.,
PLAINTIFF,
*v.*
WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS.

ORDER AND MEMORANDUM OF DECISION
August 28, 1981

NELSON, D.J.

The trustee in Bankruptcy of D. C. Sullivan & Co., Inc. ("Sullivan Company") brought this action to recover the value of certain of the bankrupt's assets that were allegedly misappropriated. Named as defendants were Watts Detective Agency ("Watts"), the alleged recipient of the bankrupt's assets; Consolidated Service Corporation ("Consolidated"), Watts' parent corporation; Christopher P. Recklitis ("Recklitis"), the President of both Watts and Consolidated; and David C. Sullivan ("Sullivan") and Billy R. Otte ("Otte"), the bankrupt's President and Vice-President. The Trustee proceeded against these defendants under the following three theories of liability alleged in the complaint under separate counts. First, that not more than one year prior to Sullivan Company's bankruptcy, and while Sullivan Company was insolvent or so as to render it insolvent, they caused certain of its assets to be transferred to Watts for less than fair consideration, in violation of former 11 U.S.C. § 107(d)(2)(a).[1]

[1] [sic]

. . . . . .

Finally, it remains to treat of the separate arguments of defendant Otte and Sullivan. Defendant Otte essentially only adopts the arguments of defendants Watts, Consolidated and Recklitis. As those defendants did not address themselves to liability under Count III, and as the other arguments of those defendants have already been dealt with, defendant Otte's liability under Count III can only be sustained.[6] Turning to the motion of defendant Sullivan, he too basically adopts the arguments of his co-defendants. The only new arguments he advances pertain to Count III, under which he argues both that the evidence was insufficient to connect him with the fraudulent transfer scheme of defendants Watts, Consolidated, Recklitis and Otte and that the verdict against him (and Otte) on Count III is inconsistent with the verdict on that count for defendants Watts, Consolidated and Recklitis. The second argument may be dismissed summarily. No authority is cited by Sullivan for the proposition that a verdict supported by sufficient evidence is to be overturned and a judgment for the moving party entered simply because the jury did not find against other defendants which found against him. Indeed, while verdict inconsistency is sometimes a ground for the awarding of a new trial, *see infra*, the sole issue on a motion for a judgment notwithstanding the verdict is the sufficiency

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[6] By adopting the arguments of co-defendants, Otte preserves those arguments only to the extent they were made. While defendants Watts, Consolidated and Recklitis argued that there was insufficient evidence of the existence of property or of a transfer of such which diminished the estate in value, *they* did not argue that even if there was sufficient evidence as to these two factors that that would not rise to the level of a breach of fiduciary duty under Count III, and thus *Otte himself* may not be heard to so argue. Given the nature of an officer's fiduciary duty to his corporation, *see infra*, the argument that participation in a fraudulent transfer under the Bankruptcy Act is not violative of that duty would be rather unlikely to prevail. In any event, since it is held above that there is sufficient evidence to sustain the jury's verdict against Otte under Count I, it is legally irrelevant whether there is also sufficient evidence to sustain its verdict against him under Count III.

of the evidence and the law to support the verdict as it concerns the moving party only. *Garrison* v. *U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); *see generally*, 9 C. Wright and A. Miller, Federal Practice and Procedure, § 2531 (1971). And as to the sufficiency of the evidence, the jury could reasonably have found that Sullivan breached his fiduciary duty to the bankrupt by participating in a transfer of the corporation's property without fair consideration at a time when the corporation was insolvent. The evidence showed that defendant Sullivan was President and a director of the bankrupt. "The directors of a commercial corporation stand in a relation of trust to the corporation and are bound to exercise the strictest good faith in respect to its property and business." *Goodwin* v. *Agassiz*, 283 Mass. 358, 361 (1933). They have "a duty of reasonably protecting and conserving its interests." *Lincoln Stores, Inc.* v. *Grant*, 309 Mass. 417, 421 (1941). The jury could reasonably have found Sullivan not to have lived up to his legal duty even though his failure to do so was not motivated by a desire for personal profit. This was not the usual case of double-dealing or other conflict of interest. Nonetheless, there was evidence that Sullivan had been a party to earlier attempts by defendants Watts and Consolidated through their President, defendant Recklitis, to purchase the bankrupt for valuable consideration, that those efforts had culminated in the April 22, 1970 meeting to which the IRS was a party, that the result of that meeting was that the Recklitis was unwilling to pay the $50,000 which he had previously offered to purchase the bankrupt. The jury could reasonably have found that Sullivan then abandoned his fiduciary duty toward the corporation and, in his own words, "handed over the business" to Recklitis. There was thus sufficient evidence to find Sullivan liable under Count III.[7]

[7] In any event, as it is held above that there is sufficient evidence to find against Sullivan under Count I, Count III is unnecessary to sustain the judgment against him.

CIV 31
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Judgment on Jury Verdict

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

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CIVIL ACTION FILE NO. 70-1336-N

DANIEL GLOSBAND, TRUSTEE ON BANKRUPTCY
FOR THE D.C. SULLIVAN COMPANY

*v.*

WATTS DETECTIVE AGENCY, INC.,
CONSOLIDATED SERVICE CORP.,
CHRISTOPHER P. RECKLITIS,
DANIEL SULLIVAN,
WILLIAM OTTE.

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## JUDGMENT

This action came on for trial before the Court and a jury, Honorable David S. Nelson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

COUNT ONE: VERDICT FOR THE PLAINTIFF.
COUNT TWO: VERDICT FOR THE DEFENDANT.
COUNT THREE: DANIEL GLOSBAND *vs.* WATTS DETECTIVE AGENCY, INC.
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* CONSOLIDATED SERVICE CORP.
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* CHRISTOPHER RECKLITIS
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* DANIEL SULLIVAN
VERDICT FOR THE PLAINTIFF.

DANIEL GLOSBAND *vs.* WILLIAM OTTE
VERDICT FOR THE PLAINTIFF.

THE PLAINTIFF HAS SUSTAINED DAMAGES IN THE AMOUNT OF $750,000.00.

Dated at Boston, Massachusetts, this 20th day of March, 1980.

(s) FRANCIS B. DELLO RUSSO
FRANCIS B. DELLO RUSSO
Dpy. Clerk of Court

# United States Court of Appeals
## For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

*v.*

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT
Entered September 14, 1982

The petition for rehearing by Daniel Sullivan, defendant-appellant, is denied.

1. The district court properly assumed jurisdiction of the pendent state claim. The issue under Count I (fraudulent conveyance under the Bankruptcy Act) and the pendent state

claim of Count III (breach of fiduciary duty) "derived from a common nucleus of operative fact" and were so intertwined that "considerations of judicial economy, convenience and fairness to the litigants" required that they be tried together. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-26 (1966). This is not the situation of *Rice* v. *Fellows of Harvard College*, 663 F.2d 336, 339 (1st Cir. 1981), where the federal claim was dismissed prior to trial and the court ruled on the pendent state claim. The facts as to whether Sullivan or Otte (defendant-appellant) received any of the fraudulently transferred property could not be determined until after trial. We note that before us neither Sullivan nor Otte raised the issue of receipt of the fraudulently transferred property. Slip op. at 14.

2. The second half of appellant's petition is merely a rehash and reargument of the conclusions and inferences to be drawn from the evidence.

By the Court:
(s) DANA H. GALLUP
Clerk.

## ISSUES OF FACT

(5) The following are the issues of fact to be determined by the jury herein (defendants contend that there are no issues of material fact in this matter and that they are entitled to a judgment as a matter of law).

(a) As propounded by Plaintiff:

1. Exactly what was it that Recklitis was negotiating to buy from the Sullivan Company prior to April 22, 1970?

2. Considering all the evidence and circumstances, did the uninterrupted servicing of the Sullivan Company customers by its regular employees have a money value as of about 5:00 P.M. on April 22, 1970, and if so, what was its fair money value?

3. Was the Sullivan Company insolvent (within the definition of 11 U.S.C. § 107) before April 22, 1970, or did it become insolvent thereafter?

4. Did the individual defendants have the actual intent to hinder, delay or defraud either the existing or future creditors of the Sullivan Company by what they did in having Watts take over servicing the Sullivan Company customers with the Sullivan Company employees?

5. Did Otte and Sullivan breach their fiduciary duties to the Sullivan Company or its other officers, directors, or stockholders, and did Recklitis induce or participate in that breach?

6. If there was a breach of fiduciary duty for which the defendants are liable, was any damage caused by that breach, and if so, what was the money amount of such damage?

(b) As propounded by Defendants:

Defendants assert that there are no issues of material fact. Without waiving this contention, for the purpose of complying as nearly as possible with the Court's pre-trial order, defendants propound the following issues of fact:

1. After 5:00 P.M. on April 22, 1970 were Sullivan Company's employees and customers the property of Sullivan Company?

2. After 5:00 P.M. on April 22 could Sullivan Company pay its employees?

3. On and after April 22, 1970 was Sullivan Company able to continue as a going concern?

4. After 5:00 P.M. on April 22, 1970 was Sullivan Company's "good will" worth anything?

~~5. Was Watts free to offer to serve the customers of Sullivan Company after 5:00 P.M. on April 22, 1970?~~ 1 > FF

6. Was Watts free to offer to serve the customers of Sullivan Company after 5:00 P.M. on April 22, 1970?

7. Was any property owned by Sullivan Company transferred to Watts Detective Agency, Inc. on April 22 or April 23, 1970?

8. Did Otte and Sullivan have a duty to the Sullivan Company not to work for Watts after April 22, 1970?

9. Did Otte and Sullivan have a duty to the Sullivan Company not to help Watts to hire the former Sullivan Company employees after April 22, 1970 and not to help Watts to secure the business of the former Sullivan Company customers after April 22, 1970?

NO. 82- 1004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTCBER TERM, 1982

DANIEL SULLIVAN,
Petitioner

v.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D. C. SULLIVAN & CO., INC.
Respondent

# RESPONDENT'S BRIEF IN OPPOSITION

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NO. 82-658

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OCTCBER TERM, 1982

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THE WRIT SHOULD BE DENIED BECAUSE THE LOWER COURT PROPERLY REFUSED TO OVERTURN THE ASSUMPTION OF PENDENT JURISDICTION OF A STATE CLAIM ALREADY DETERMINED ON THE MERITS ALONG WITH RELATED SUBSTANTIAL BANKRUPTCY CLAIMS COMMITTED TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURT.

The four "Reasons for the Writ" subtended by Daniel Sullivan in his petition are all inter-related, and amount to an argument that in this bankruptcy action the district court's exercise of pendent jurisdiction over the state law claim that the petitioner had breached his fiduciary duties, was improper and in contravention of Article III provisions governing the exercise of jurisdiction by federal courts. The lower court, in denying Sullivan's petition for rehearing on this argument, had little difficulty holding that "[t]he district court properly assumed jurisdiction of the pendent state claim." (Petitioner's Supplementary Appendix at 109). The court found the basis for that ruling in the well-established principles of United

Mine Workers v. Gibbs, 383 U.S. 715 (1966). Because the Gibbs principles are applicable, particularly in light of the stage of the proceedings in this banrkuptcy litigation, the lower court's decision was proper and should not be disturbed.

In a Pre-trial Order issued early in this litigation, the District Court made the following determination regarding its jurisdiction to hear the Trustee's claims:

> "Jurisdiction is vested in this court by virtue of plaintiff's claim that it has stated a cause of action under Section 67(d) and 67(e) of the Bankruptcy Act (11 U.S.C. §107) by purportedly alleging a fraudulent conveyance of the property of the bankrupt plaintiff, and with respect to Count 3, by virtue of the Court's pendant jurisdiction, under 28 U.S.C. §1331."

The plaintiff filed his complaint in 1970, setting out the circumstances of the transfer of the assets of the D.C. Sullivan Company. He alleged in Count I that said transfer constituted a fraudulent conveyance without consideration under §67d(2)(a) of the Bank-

ruptcy Act, and in Count II that said transfer was made with the actual intent to hinder, delay, or defraud the creditors of the company. Count III alleged the state claim of breach of fiduciary duties by defendants Sullivan and Otte, officers and directors of the company, for permitting and cooperating with the other defendants to whom the assets were transferred. The District Court's assumption of jurisdiction properly was decided based on the pleadings. See Jackson v. Stinchcomb, 635 F.2d 462, 471 (5th Cir. 1981). The fact that the federal claims against Sullivan were subsequently determined to be non-meritorious--the jury found for the defendants (Sullivan included) on Count II in 1980, and the Court of Appeals reversed the judgment against Sullivan on Count I in 1982--does not entitle the petitioner at this late date to a writ of certiorari to review the judgment of the Court of Appeals on the pendent jurisdiction issue. It was

not reversible error for the lower court to refuse to vacate the judgment on the state fiduciary duty claim that had already been decided on its merits. See State of Arizona v. Cook Paint and Varnish Co., 541 F.2d 226 (9th Cir. 1976).

In Gibbs, supra, the respondent brought parallel federal statutory and Tennessee common law claims in federal court against the United Mine Workers, arising out of alleged concerted union efforts to deprive him of contractual and employment relationships with the owners of a coal mine. Although the federal claim was ultimately dismissed after trial, and diversity was absent, this court found no error in the District Court's retention of jurisdiction over the state claim, despite its reversal on the merits of that claim. The court in Gibbs established that it is within the sound discretion of the District Court to exercise jurisdiction over

state law claims which are pendent to claims arising under federal law, where the claims "derive from a common nucleus of operative fact" or the plaintiff "ordinarily [would] be expected to try [the claims] all in one judicial proceeding." This power is to be exercised where warranted by "considerations of judicial economy, convenience and fairness to litigants." Id. at 725-726.

The Trustee maintains that the instant case fits precisely within the guidelines established in Gibbs. Surely the petitioner cannot dispute that the state law claim here was based on the same facts and evidence as the bankruptcy claims. It thus met the Gibbs standards, as the factual relationship between the federal claim and the state claim "permits the conclusion that the entire action before the court comprises but one constitutional 'case'." Id. at 725. Petitioner, however, takes issue here with the Gibbs requirement that the federal claim have substance

sufficient to confer subject matter jurisdiction on the court. In doing so, he wrongly characterizes the court's assumption of jurisdiction in this case as an unwarranted extension of the nascent concept of pendent party jurisdiction as rejected in Aldinger v. Howard, 427 U.S. 1 (1976). As will be demonstrated, however, even if the petitioner is correct that this case is analogous to the situation in Aldinger, the lower court's refusal to overturn the district court's assumption of jurisdiction was perfectly proper.

Implicit in the traditional concept of pendent jurisdiction is that the court already has jurisdiction over all the parties involved; where, for instance, a substantial federal claim has been asserted against the defendant. Throughout the entire procedural history of the instant litigation--from its inception until the post-trial stage--the district court and the parties assumed that

jurisdiction over all of the claims against the petitioner properly lay in that court because of allegations against him under the Bankruptcy Act. See Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977). Gibbs and its progeny make it clear that federal jurisdiction to try a pendent claim exists, even if the federal claim is ultimately dismissed, if the federal claim is "not insubstantial." In such a situation, the pendent jurisdiction survives the dismissal of the claim to which it appends. Ferguson v. Flying Tiger Line, Inc., 688 F.2d 1320, 1321, n. 1 (9th Cir. 1982); Rieser v. District of Columbia, supra, at 473. Under the substantiality test, "if there is any foundation of plausibility to the claim federal jurisdiction exists." O'Brien v. Continental Illinois National Bank and Trust Company of Chicago, 593 F.2d 54, 63 (7th Cir. 1979), citing 13 Wright & Miller, Federal Practice and Procedure, §3564 (1975). The question for jurisdictional purposes is "not whether the claims are without

merit but whether 'prior decisions inescapably render the claims frivolous'." Jackson v. Stinchcomb, 635 F.2d 462, 471 (5th Cir. 1981), quoting Hagans v. Lavine, 415 U.S. 528 (1974) (claims not so obviously implausible as to be completely devoid of merit). Hagans itself makes it clear that previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for jurisdictional purposes, citing Bell v. Hood, 327 U.S. 678, 682 (1946) for the proposition that:

> "Jurisdiction...is not defeated...by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover...If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

Similarly, the Court of Appeals in this case did not view its reversal of the judgment against petitioner on Count I

under the Bankruptcy Act to be inconsistent with its determination on Sullivan's petition for rehearing that the district court properly had assumed jurisdiction over the pendent state claim. Furthermore, petitioner's argument that because the lower court deemed the issue of recovery under the Bankruptcy Act against someone such as the defendant who did not receive the fraudulent transfer of property, to be an "open and shut question of law", does not significantly aid the petitioner, especially under the foregoing Bell v. Hood analysis. Indeed, it was not until the Trustee was preparing his brief on appeal, and in response to Sullivan's argument that he was entitled to a judgment n.o.v. on both the bankruptcy count and the pendent claim for evidentiary reasons, the Trustee found and cited the case of Elliott v. Glushon, 390 F.2d 514 (9th Cir. 1967), that that authority

ever arose in this litigation. In his brief the Trustee pointed out that Elliott itself had noted a "conflict of authority" on the subject of recovery under §67d of the Bankruptcy Act, and that the Elliott court had followed one line of cases and held that the "recipients" of the fraudulently transferred property were the only parties liable to the trustee. The Trustee cited what he believed to be the more equitable line of cases based on the policy of joint tortfeasor liability, represented by Brainard v. Cohn, 8 F.2d 13 (9th Cir. 1925) and Inland Security Company, Inc. v. Estate of Kirshner, 382 F.Supp. 338 (W.D. Mo. 1974), which closely approximated the breach of fiduciary theory under the pendent claim. The fact that the lower court was more convinced by Elliott v. Glushon, supra, than by the other cases which foresaw liability on the part of a party such as Sullivan does not mean that

the Trustee's claim under the Bankruptcy Act was so completely frivolous as to render it insubstantial for jurisdictional purposes under the Hagans v. Lavine analysis, supra[1]. Moreoever, an important factor in the court's reasoning in Elliott, supra, was the possibility, that "the trustee may still have a right of action for fraud or deceit under state law against those who participated in the transaction", as the Court of Appeals noted in its opinion below (Petitioner's Supplementary

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[1]Contrary to the petitioner's assertion, therefore, this is not a case where the Trustee's claims under §67d of the Bankruptcy Act were "facially defective." In this way it is distinguishable from Aldinger v. Howard, 427 U.S. 1 (1976), wherein the party was absolutely prohibited from being in federal court because 42 U.S.C. §1983 on its face (at that time) excluded suits against a "county." Former §67d of the Bankruptcy Act, upon which jurisdiction was based here, provided only that a transaction found to be fraudulent shall be "null and void against the trustee...." 11 U.S.C. §107(d)(6).

Appendix at 3a). Undoubtedly implicit in that court's refusal to upset pendent jurisdiction here was the recognition that such a right of action no longer exists in this case, almost thirteen years after the events which formed the basis of this suit. See O'Brien v. Continental Illinois National Bank and Trust Company of Chicago, supra, (Pendent state law claim should be retained when there is a substantial possibility that a subsequent state court suit on the claim may be time-barred).

Indeed, the policy reasons for refusing to issue a writ of certiorari override any question of the substantiality of the federal claim here. This is obviously not a case in which the court reached out to decide a state law issue after dismissing the federal claim. See State of Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976). Thus, even if this court were to decide that there was no independent basis

of federal jurisdiction over petitioner Sullivan because of insubstantiality, and therefore this case in essence involves pending another party onto the federal action, the lower court's decision should not be disturbed. Numerous cases since Gibbs, supra, have extended that opinion's reasoning to pendent jurisdiction over state law claims against defendants over whom there is no independent basis of federal jurisdiction, if the claims arose out of the same nucleus of operative fact as the federal claims applicable to another defendant. See, e.g., Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), cert. denied, 416 U.S. 996 (1974); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1971). These cases are instructive here.

In Aldinger v. Howard, 427 U.S. 1 (1976), heavily relied upon by petitioner, this court discussed the subject of pendent

party jurisdiction in the context of an action alleging civil rights violations under 42 U.S.C. §1983. A county employee had sued her supervisor, the commissioners and the county itself, maintaining that the district court had pendent jurisdiction over the county which was not suable as a "person" under §1983. Noting that the issue had arisen at the pleading stage, the court disapproved of adding a completely new party over whom the district court had no power under the Civil Rights Act, viewing that as an unwarranted extension of the pendent jurisdiction doctrime. The court reasoned that the plaintiff in such a situation sought to use the Gibbs Court's definition of the scope of a "case" so as to bring into federal court a party whom Congress never intended to be there. The court stated:

> "Before it can be concluded that [pendent party] jurisdiction exists,

> a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."

Id. at 18.

Since federal jurisdiction in Aldinger was based on 28 U.S.C. §1343(3), the jurisdictional counterpart of 42 U.S.C. §1983, and because previous Supreme Court decisions established that Congress did not intend municipal corporations to be suable in federal court under those statutes, the Aldinger court held that there was no pendent jurisdiction of plaintiff's claim against the county. In doing so, the Court carefully limited its holding, with language which is of instant relevance:

> "[W]e decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. When the

> grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. §1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together." Id. (emphasis in original).

These qualifying statements shed much light on the instant situation. The district court is granted exclusive jurisdiction over this bankruptcy action pursuant to 28 U.S.C. §1334. Nothing in 28 U.S.C.§1331, authorizing general federal question jurisdiction, and upon which the district court based its assumption of pendent jurisdiction would seem to preclude the court's exercise of jurisdiction over Count III here. Aldinger expressly declined to decide whether pendent party jurisdiction could be supported under §1331, but at least one lower court has found since then that §1331 supports the exercise of pendent party jurisdiction. See State of

North Dakota v. Merchants National Bank & Trust Co., 634 F.2d 368 (8th Cir. 1980). Moreover, despite the court's interpretation of §67d of the Bankruptcy Act in Elliott v. Glushon, supra, that statute cannot be read as a Congressional directive that its purpose would be circumvented if pendent jurisdiction were allowed in a case such as this. The state claim here was in a true sense ancillary to and dependent on the federal claims, and the trustee's rights would be lost if the pendent jurisdiction were held improper.

Similarly, the principles expressed in Aldinger, supra, indicate the insubstantiality of several of the petitioner's purported justifications for the allowance of the writ. Petitioner argues that the lower court's decision creates conflict in the circuits on this issue and that it will upset the distribution of power between the federal government and the states in light of the Article III parameters on federal jurisdiction.

Firstly, no substantial conflict exists necessitating a new Supreme Court opinion on pendent (party) jurisdiction based on this case. As the Court makes clear in Aldinger, the issue is "subtle and complex", and "it would be unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction." Id. at 18. The court's very statement that "[o]ther statutory grants and other alignments of parties" may call for a different result was a recognition of the overwhelming importance of the particular facts of each case in the resolution of the jurisdictional issue. Thus, the specific conflict that petitioner cites between Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977) and Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977), is of minimal significance. The instant case is factually analogous to Transok, in which the court affirmed the exercise of pendent party

jurisdiction, relying on the test enunciated in Aldinger, supra, in a situation where there was exclusive jurisdiction in federal court to try the particular claim against the principal party (under 25 U.S.C. §357) so that there could be a trial of all the claims only in federal court. As the court noted in Transok, supra, the narrow approach utilized by the Ninth Circuit in Ayala, supra, "is not justified from a reading of Aldinger, which can be read to indicate that there is power to exercise pendent party jurisdiction unless Congress has expressly or impliedly negated such power in a particular jurisdictional context." Transok Pipeline Co v. Darks, 565 F.2d at 1155. Moreover, as the cases cited throughout this brief indicate, the majority of jurisdictions would utilize a more liberal approach in the context of a suit such as the instant one.

In addition, Article III presents no obstacle to the adjudication

of the pendent state claim here. The Aldinger court, while focusing almost exclusively on the legislative intent of the particular jurisdictional statute, appeared to conclude that the "general contours" of Article III posed no problem in that case. It noted the Gibbs court's flexibility within the parameters of Article III, which indicated that "in treating litigation where nonfederal questions or claims were bound up with the federal claim upon which the parties were already in federal court, this Court has found nothing in Article III's grant of judicial power which prevented adjudication of the nonfederal portions of the parties' dispute." Aldinger v. Howard, 427 U.S. at 9.

The Trustee maintains that the instant case is much more akin conceptually to the type of situation contemplated by the Court in Gibbs, supra, wherein the parties were already present in federal court, and despite the dismissal of the federal claim, the court

could retain jurisdiction over the pendent state claim which arose out of the same facts. The lower court's decision does not represent an unwarranted expansion of pendent party jurisdiction as cautioned against in Aldinger, supra. In Aldinger, the court stated that "the extension of Gibbs to this kind of pendent party jurisdiction--bringing in an additional defendant at the behest of the plaintiff--presents rather different statutory jurisdictional considerations", in light of "[p]etitioner's contention that she should be entitled to sue Spokane County as a new third party, and then to try a wholly state-law claim against the county, all of which would be 'pendent' to her federal claim against respondent county treasurer...." Aldinger v. Howard, 427 U.S. at 15. Sullivan really cannot be considered that type of "new" party, and this case is missing the element of "subterfuge" implied in that case. The Trustee, and all of the other parties, for that matter, assumed in good faith for twelve years that Sullivan was properly subject to

the court's jurisdiction under the Bankruptcy Act. Even if that jurisdictional basis is regarded as based on an "insubstantial federal claim", so that Sullivan is a pendent party over whom no independent basis of jurisdiction exists, Aldinger and other cited cases provide support for the Trustee's position here, as the foregoing analysis illustrates.

Finally, the foregoing analysis is aided by the most compelling reason for refusing to grant the petitioner's writ here--the fact that the entire case has already been tried on the merits, and inordinate amounts of time and energy have been spent on this litigation. The courts are in unanimous agreement that in a situation such a this, "considerations of judicial economy, convenience and fairness to litigants" favor the retention of jurisdiction over state law issues, where both state and federal claims were tried together and the latter only dismissed after trial. See

Lentino v. Fringe Employment Plans, Inc., 611 F.2d 474 (3d Cir. 1979); Transok Pipeline Co. v. Darks 565 F.2d 1150 (10th Cir. 1977); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Forest Laboratories, Inc. v. Pillsbury Company, 452 F.2d 621 (7th Cir. 1971). This is especially true in view of the fact that the particular jurisdictional objection was raised for the first time on appeal. Id. at 629, citing Rosado v. Wyman, 397 U.S. 397 (1970). Thus, the lower court properly noted that Sullivan had not raised the related issue of the receipt of fraudulently transferred property before his Petition for Rehearing (Petitioner's Supplementary Appendix at 11a). Cf. In re Union National Bank & Trust Co. of Souderton, Pa., 298 F.Supp. 422 (E.D. Pa. 1969) (an action under state law for mishandling fiduciary accounts was retained after dismissal of claim that accounts were bankruptcy accounts under the Bankruptcy Act). In

light of this well-established and practical policy, the Court of Appeals did not err in concluding that the district court's assumption of jurisdiction of the pendent state claim should not be disturbed, and additional elaboration on its part was not necessary.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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